3-1-2011


John H. Lawrence

Follow this and additional works at: http://scholarship.law.unc.edu/falr

Part of the First Amendment Commons

Recommended Citation


Available at: http://scholarship.law.unc.edu/falr/vol9/iss3/9
SEARCHING FOR SECURITY: THE PROPOSED WORKPLACE RELIGIOUS FREEDOM ACT (WRFA) AND NEED FOR HEIGHTENED PROTECTIONS FOR THE RELIGIOUS EXPRESSION OF PRISON EMPLOYEES IN THE WORK ENVIRONMENT

John H. Lawrence*

INTRODUCTION

Can you picture yourself being compelled to make a choice between adhering to the tenets of your religious faith and maintaining your employment? Moreover, would you ever think that it was possible for your employer to deny you the opportunity to exercise your faith in the work environment, offer very little justification for such a deprivation, and then summarily terminate your employment for adhering to the dictates of your religion? These questions are neither fanciful nor divorced from reality. The inquiries themselves seem to

* Juris Doctor Candidate, University of North Carolina School of Law, 2012.


2. See, e.g., E.E.O.C. v. GEO Group, Inc., 616 F.3d 265, 277 (3d Cir. 2010) (holding that a private employer did not, under the dictates of Title VII of the Civil Rights Act of 1964, have to allow female workers to wear Muslim headscarves during the course of employment at a prison because of general safety issues).
reflect the very real and agonizing situation in which some of America’s prison workers have found themselves over at least the last decade. The source of this problem can be attributed, at least in part, to the very weak “undue hardship” standard advanced through the “amended” portion of Title VII of the Civil Rights Act of 1964 (Title VII). In essence, the standard allows employers to deny the religious expression rights of employees if their acts of expression cause a “de minimis” disruption in the work environment. As a result, the right to religious expression of prison employees, particularly in the areas of religious clothing and grooming practices, appears to be an area susceptible to subordination of other interests. In particular, this reality has emerged as a result of the

3. See, e.g., GEO Group, 616 F.3d at 267; Booth v. Maryland, 327 F.3d 377, 380-82 (4th Cir. 2003) (implying that Title VIII would not be violated when state officials adhere to a grooming policy that results in the preclusion of a prison worker from wearing religiously-motivated dreadlocks in the workplace due to security concerns).


5. GEO Group, 616 F.3d at 267.


8. See GEO Group, 616 F.3d at 274-75 (holding that a private employer did not, under the dictates of Title VII of the Civil Rights Act of 1964, have to allow female workers to wear Muslim headscarves during the course of employment at a prison because of general safety issues); Booth, 327 F.3d at 380-82 (implying that Title VII would not be violated when State officials adhere to a grooming policy that results in the preclusion of a prison worker from wearing religiously-motivated dreadlocks in the workplace due to security concerns). It is important to note that the Fourth Circuit’s decision in Booth largely centers on the fact that Booth brought his claims against the defendants under various federal and state laws and not Title VII. Id. at 378. However, the case is cited here and is used in this overall analysis of Title VII due to the decision’s support for the general security concerns offered by the defendants and the author of this Note’s assertion that these security interests would have been sufficient under Title VII. See id. at 381; discussion infra Part II.

9. See GEO Group, 616 F.3d at 275 (“[T]he prison has an overriding responsibility to ensure the safety of its prisoners, its staff, and the visitors. A prison
collision between the security interests that prisons maintain and the apparently legitimate desires of employees therein to express their individual faiths during the course of employment.\textsuperscript{10} Unfortunately, as the relatively recent cases, \textit{Booth v. Maryland}\textsuperscript{11} and \textit{E.E.O.C. v. GEO Group, Inc.}\textsuperscript{12} demonstrate, the weak protections provided by Title VII seem to create a situation in which prison workers face a significant burden in showing that their interests in religious expression equal or trump the proffered security interests of the nation's prisons.\textsuperscript{13}

Fortunately, the Workplace Religious Freedom Act (WFRA),\textsuperscript{14} a piece of proposed national legislation,\textsuperscript{15} appeared to receive ongoing consideration in recent sessions of Congress.\textsuperscript{16} As the WRFA aims to

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Booth}, 327 F.3d at 381 ("There is no evidence that the Division developed the policy to regulate or prohibit religious activities, including Booth's practice of Rastafarianism, and the defendants presented persuasive evidence that DCD 50-43 was likely adopted for the neutral secular purposes of promoting public safety, discipline, and \textit{esprit de corps}.").
\item 327 F.3d 377 (4th Cir. 2003).
\item 616 F.3d 265 (3d Cir. 2010).
\item See id. at 274-77 (implying that, while the purported safety concerns of the prison could be considered tenuous, they were sufficient to overcome employees' Title VII claims); \textit{Booth}, 327 F.3d at 380-81 (suggesting that the security interests underlying the applicable prison policy were sufficient in and of themselves to overcome Booth's religiously-motivated grooming practices).
\item Workplace Religious Freedom Act of 2007, H.R. 1431, 110th Cong. (2007). It is important to note that Senator John F. Kerry (D-Ma.) introduced a version of the WRFA before the United States Senate in 2008, Workplace Religious Freedom Act of 2008, S. 3628, 110th Cong. (2008), and 2010, Workplace Religious Freedom Act of 2010, S. 4046, 111th Cong. (2010). Given the overall arguments of this Note and the fact that Senator Kerry’s recent versions of the WRFA do not appear to affect the positions advanced herein surrounding potential religious expression protections for prison workers, H.R. 1431 and commentary on this version of the WRFA will be predominantly cited throughout this Note. The reader should take into account this citation decision when considering the perspectives offered in this Note from cited sources regarding the WRFA. Further information regarding this choice and background on these different versions of the WRFA is discussed elsewhere in this Note. See discussion \textit{infra} Part II.
\item See H.R. 1431.
\end{enumerate}
\end{footnotesize}
Title VII by heightening the standard an employer must
overcome before lawfully denying certain forms of employee religious
expression in the workplace,18 there appears to be some hope that prison
workers will have a fighting chance19 in overcoming the security
concerns that have effectively neutralized recent expression claims.20 As
such, this Note seeks to argue that, if the WRFA becomes law, courts
must engage in a far more critical and probing examination of the
security concerns proffered by prison facilities for the sake of the
religious liberty interests of prison employees. Specifically, this Note
maintains that courts should more actively address the clear instances
where prison officials offer security concerns related to employee “garb
and grooming”21 that appear either tenuous or unfounded.22 This position
reflects the idea that, while safety is an understandable and justifiable
primary consideration in the nation’s prisons, the inherent value of the
religious expression rights of prison employees demands that prisons
offer legitimate foundations for stated security concerns.23 For these
reasons, courts should interpret the WRFA and the heightened standard it
advances as a basis for ensuring that prison policies serve legitimate

17. H.R. 1431.
18. Giles Roblyer, Half-Answered Prayers: Sturgill v. United Parcel Service,
512 F.3d 1024 (8th Cir. 2008), 77 U. CIN. L. REV. 1683, 1703 (2009).
19. See Foltin, supra note 1, at 71 (stating that the WRFA will help protect
religious freedom, especially that of minority groups, by urging courts to view “the
religious accommodation provision of Title VII in a fashion consistent with other
protections against discrimination to be found elsewhere in this nation’s civil-rights
laws”).
20. See E.E.O.C. v. GEO Group, Inc., 616 F.3d 265 (3d Cir. 2010); see also
Booth v. Maryland, 327 F.3d 377 (4th Cir. 2003).
Your Job, FIRST AMENDMENT CENTER, Sept. 21, 2003,
22. See GEO Group, 616 F.3d at 285 (Tashima, J., dissenting) (stating that the
majority’s opinion “in effect, establishes a per se rule that when an employer asserts
that its rationale for denying a religious accommodation is safety, the employer need
not adduce any evidence to prove the existence of, let alone the magnitude of, the
burden it would suffer by accommodating the religious practice”).
23. See id. at 277 (Tashima, J., dissenting) (“The majority, thus, effectively
relieves GEO, as the employer and moving party asserting safety concerns, of the
burden of proving the existence of the asserted safety concerns, as well as of the fact
and magnitude of the asserted hardship in accommodating plaintiffs religious
needs.”).
security interests, that security concerns are more effectively balanced with the religious expression rights of prison employees, and that the apparent disparity in religious expression protections offered to prisoners versus prison employees is minimized.\textsuperscript{24}

I. BACKGROUND ON THE NEED, PURPOSE, AND RENEWED CONGRESSIONAL INTEREST IN THE WORKPLACE RELIGIOUS FREEDOM ACT (WRFA)

The Workplace Religious Freedom Act of 2007 (WRFA),\textsuperscript{25} a piece of proposed legislation that aims to bolster protections for religious expression in the workplace,\textsuperscript{26} has received ongoing consideration from Congress for well over a decade.\textsuperscript{27} In general, the WRFA was originally created with the goal of amending Title VII of the Civil Rights Act of

\textsuperscript{24} This divide appears to have resulted, at least in part, from the passage and effect of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1 et seq. (2006). \textit{See} Cutter v. Wilkinson, 544 U.S. 709, 721 (2005) ("RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion."); \textit{see also} GEO Group, 616 F.3d at 288 (Tashima, J., dissenting) (implying that sacrificing certain religious garb choices of employees for the sake of safety concerns seems nonsensical when the permitted clothing choices of prisoners appear to pose a substantial threat to safety); discussion \textit{infra} Part III (discussing the disparity in treatment of prisoners versus prison employees).

\textsuperscript{25} H.R. 1431, 110th Cong. (2007). There was also a similar, but more targeted bill in the Senate in 2008. S. 3628, 110th Cong. (2008). This bill was reintroduced in 2010. S. 4046, 111th Cong. (2010).


1964 in a manner that would offer employees greater freedoms to express their faith in the workplace. Specifically, Title VII “prohibits employers from discharging or disciplining an employee based on his or her religion.” Despite the apparent legal protection this language affords employees, Title VII is limited in a notable manner, which has helped to underscore the need for congressional legislative action through the WRFA. Title VII maintains that an employer is not bound by the dictates of its language if the employer “is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” Given these terms, the United States Supreme Court has suggested that “[a]n accommodation constitutes an ‘undue hardship’ if it would impose more than a \textit{de minimis} cost on the

28. 42 U.S.C. § 2000e(j) (2006). While the WRFA was an amendment to Title VII, Senator Kerry has indicated that the proposed legislation functioned as a type of “restoration” of the “original intent” of the 1972 Congress in amending the Civil Rights Act of 1972. 145 CONG. REC. S11, 647 (daily ed. Sept. 29, 1999) (statement of Sen. Kerry). Senator Kerry has stated:

This 1972 amendment, although completely appropriate, has been interpreted by the courts so narrowly as to place little restraint on an employer’s refusal to provide religious accommodation. The Workplace Religious Freedom Act will restore to the religious accommodation provision the weight that Congress originally intended and help assure that employers have a meaningful obligation to reasonably accommodate their employees’ religious practices.

Id.


31. BACKGROUNDER, supra note 29. See also Sonne, supra note 27, at 1025-26 (highlighting this Title VII exception and introducing the WRFA’s proffered solution to it).

32. See BACKGROUNDER, supra note 29 (highlighting, generally, the limitations of Title VII and the WRFA’s potential impact in ameliorating such limitations).

employer." Such a standard is problematic given the fact that it seems to be "not a difficult threshold to pass." Consequently, some employee-plaintiffs have seen their claims surrounding the right to freely observe and express their faith in the workplace struck down by federal courts.

Although the above trend has served to represent, in relative terms, the legal reality surrounding religion and the workplace over the last few decades, the WRFA has been considered by Republican and Democratic members of Congress as a means of upholding the fundamental constitutional ideal of religious freedom in a reasonable manner in the employment arena. This perspective has persisted despite the reality that the WRFA has remained a proposed law since the early to

34. Webb, 562 F.3d at 259-60 (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).
35. Id. at 260 (quoting United States v. Bd. of Educ., 911 F.2d 882, 890 (3d Cir. 1990)).
36. See, e.g., id. at 258 (holding that police officer's request to wear a "headscarf" during the course of her employment would impose an "undue burden" on the city in question); Wilson v. U.S. W. Commc'ns, 58 F.3d 1337, 1342 (8th Cir. 1995) (affirming the denial of worker's Title VII claim against employer for being terminated after failing to remove a religiously motivated anti-abortion pin while she was in the workplace). This trend is significant given that "[b]ased on figures released by the Equal Employment Opportunity Commission, the number of claims of religious discrimination in the workplace filed for the fiscal year ending on September 30, 2006, as compared to the fiscal year ending on September 30, 1992, reflect a startling increase of over 75 percent." Foltin, supra note 1, at 68.
37. See Foltin, supra note 1, at 67-68 (implying that the Civil Rights Act, since 1972, has fallen short in offering adequate religious expression protections); see also Caplen, supra note 27, at 588-600 (discussing, generally, the legal standard of Title VII as applied to religious accommodation in the workplace since the late 1970s).
39. See Sen. Rick Santorum & Sen. John Kerry, Op-Ed, Religion in the Pharmacy, N.Y. TIMES, April 12, 2005, available at http://www.nytimes.com/2005/04/12/opinion/12kerry.html [hereinafter Santorum & Kerry] (writing that WRFA, in at least one context, "provides a sensible solution to the potential conflict between an employee's religious conviction and the needs of pharmacy customers"); see also 145 CONG. REC. S11, 647 (daily ed. Sept. 29, 1999) (statement of Sen. Kerry) ("The restoration of this protection is no small matter. For many religiously observant Americans the greatest peril to their ability to carry out their religious faiths on a day-to-day basis may come from employers.").
middle part of the 1990s and its coalition of supporters has undergone certain changes in composition in recent years. Such alterations have been, at least to some degree, a product of Senator John F. Kerry's (D-Ma.) 2008 introduction before the United States Senate of what is considered a "targeted" version of the WRFA. Specifically, this version of the WRFA "identifies two practices — wearing religious clothing or hairstyles, and taking time off for a religious reason — as ones that will amount to undue hardship only if they impose significant difficulty or expense" on the employer. While previous versions of the proposed legislation have also advanced the "significant difficulty or expense" interpretation of undue hardship, the 2007 House version of the WRFA is more comprehensive than its 2008 counterpart in that it includes the "stipulation that 'to be considered to be reasonable, [an] accommodation shall remove the conflict between employment requirements and the religious observance or practice of the employee.'" Such language is


41. Interview with James Gibson, Staff Counsel, Baptist Joint Committee for Religious Liberty, in Washington, D.C. (Jan. 31, 2011) (notes on file with author) [hereinafter Gibson Interview] (noting that, following Senator Kerry's introduction of the 2008 version of the WRFA, coalition composition began to shift); see also Hollman, supra note 26, at 6 ("Negotiations in recent weeks demonstrate that such legislative efforts require a painstaking process of listening, drafting, responding, re-drafting and determining what compromises can be made without giving up the bulk of what was intended in the first place.").

42. S. 3628, 110th Cong. (2008).

43. See Gibson Interview, supra note 41; Foltin, supra note 1, at 74. ("It has been suggested that the way to deal with these concerns is to resort to a so-called 'targeted' approach, under which Congress would single out particular religious practices — dress, grooming, holy days — for protection under the WRFA standard.").


45. See, e.g., Workplace Religious Freedom Act of 2007, H.R. 1431, 110th Cong., § 2(a)(4) (2007) (proposing the addition of language clarifying that undue hardship "means an accommodation requiring significant difficulty or expense").

46. With the introduction of Senator Kerry's targeted version of WRFA in 2008, the 2007 version is often referred to as the comprehensive version of WRFA due to its more expansive language. Gibson Interview, supra note 41.

47. See Futrell, supra note 16, at 419 (quoting H.R. 1431, 110th Cong., § 2(b)(2) (2007)).
suggestive of more sweeping protections for the religious expression of employees in the workplace, and its removal in the 2008 version indicates Congress' attempts to tailor the proposed Act in a manner that would result in its eventual passage.

Even with the change in language of the proposed legislation, for the purposes of the arguments advanced in this Note, the 2007 and 2008 versions of the WRFA present similar concerns regarding potential religious expression protections afforded to prison workers. The central and consistent thrust of the WRFA is to ensure employers allow for more significant accommodation of the religious practices of employees during the course of their employment. In particular, while the 2007 version of the WRFA and its potential impact are discussed below, both the 2007 and 2008 versions of the proposed Act include general protections for the garb and grooming practices of employees and reinterpret "'undue

48. Gibson Interview, supra note 41.
49. Id. (highlighting that the comprehensive versions of WRFA failed to become law under Congresses and Presidents of variant political compositions since its original introduction in the early- to mid-1990s and that the targeted version seeks to increase the likelihood of enactment).
51. Due to the similarities between these versions of the WRFA and the fact that it remains unclear which version could eventually become law, for the purposes of this Note, the citations below regarding support for and criticism of the WRFA pertain to the 2007 version. H.R. 1431, 110th Cong. (2007).
52. These specific areas of protection are particularly salient because they appear to provide some significant grounds for conflict between employers and employees. See E.E.O.C. v. GEO Group, Inc., 616 F.3d 265-66, 274 (3d Cir. 2010) (holding that a private employer did not, under the dictates of Title VII of the Civil Rights Act of 1964, have to allow female workers to wear Muslim headscarves during the course of employment at a prison because of general safety issues); Booth v. Maryland, 327 F.3d 377-78, 383 (4th Cir. 2003) (implying judicial acceptance of the security concerns inherent in a prison’s adherence to a grooming policy that resulted in prohibiting a prison worker from wearing religiously-motivated dreadlocks in the workplace). See also James M. Oleske, Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation, 6 U. PA. J. CONST. L. 525, 533-36 (2004) (alluding to an apparent trend in how some lower courts view certain employment guidelines as to, inter alia, religious garb and grooming practices of employees).
53. See Gibson Interview, supra note 41; Foltin, supra note 1, at 71 ("WRFA would also make clear that the employer has an affirmative and ongoing obligation to reasonably accommodate an employee’s religious practice and observance.").
hardship’ as an accommodation ‘requiring significant difficulty or expense.’”54 Given that this specific elevated standard embodies a proposed change and not a present reality, it remains unclear how courts will interpret and apply this standard if either version of the WRFA becomes law.55 However, supporters of the WRFA and its heightened standard have suggested that the level of protections offered to employees could be substantial.56 As one of the WRFA’s main proponents has claimed, the WRFA will help protect religious freedom by urging courts to view “the religious accommodation provision of Title VII in a fashion consistent with other protections against discrimination to be found elsewhere in this nation’s civil-rights laws.”57 Another commentator has echoed these sentiments, stating, “Once enacted, the WRFA will represent ‘another milestone in civil rights.’”58 In light of these perspectives, the WRFA could allow employees to have the opportunity in the workplace to at least maintain garb and grooming practices inherent in their faiths because the proposed Act would

\[\text{Compare S. 3628, 110th Cong. § 2 (2008) (including explicit language protecting garb and grooming practices) with H.R. 1431, 110th Cong. § 2 (2007) (using broader language which can be construed as covering these religious observances).}\]


55. See Lauren E. Bohn, Workplace Religious Freedom Bill Finds Revived Interest, RELIGION NEWS SERVICE, May 3, 2010, available at http://www.huffingtonpost.com/2010/05/03/workplace-religious-freed_n_561560.html (suggesting that there is uncertainty regarding how the heightened standard of the WRFA will be applied and what its impact will be if passed by Congress).

56. See Foltin, supra note 1, at 76 (arguing, in reference to the 2007 version of the proposed legislation, that “[e]nactment of the Workplace Religious Freedom Act will constitute an important step towards ensuring that all members of society, whatever their religious beliefs and practices, will be protected from an invidious form of discrimination”); see also 145 CONG. REC. S11, 647 (daily ed. Sept. 29, 1999) (statement of Sen. Kerry) (explaining that “[t]he restoration of this protection is no small matter. For many religiously observant Americans the greatest peril to their ability to carry out their religious faiths on a day-to-day basis may come from employers.”).

57. Foltin, supra note 1, at 71.

58. Caplen, supra note 27, at 624 (quoting Richard T. Foltin & James D. Standish, Reconciling Faith and Livelihood: Religion in the Workplace and Title VII, 31 HUM. RTS. 19, 24 (Summer 2004)).
strengthen the relatively feeble interpretation of undue hardship maintained by the United States Supreme Court.\textsuperscript{59}

However, despite the potentially significant protections that the WRFA aims to offer and the fact that supporters of the proposed legislation hail from a range of groups,\textsuperscript{60} the WRFA has not been without detractors.\textsuperscript{61} It appears that, in particular, a “set of concerns has been raised that implementation of WRFA will lead to material adverse impacts on third parties.”\textsuperscript{62} One prominent group, for example, has emphasized in the past that the apparent thrust of the WRFA could enable employees to essentially use their religious beliefs as justifications for not interacting with certain individuals based on race, religion, sexual orientation, or other traits and characteristics.\textsuperscript{63} This particular area of opposition can apparently be narrowed further, as it essentially surrounds “two types of hypothetical situations — that WRFA will be used to protect those who would cite religious beliefs as a

\textsuperscript{59} See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (establishing the “de minimis” cost consideration associated with the undue hardship standard); see also Bilal Zaheer, Note, Accommodating Minority Religions Under Title VII: How Muslims Make the Case for a New Interpretation of 701(j), 2007 U. ILL. L. REV. 497, 510-13 (2007) (providing a general background discussion on the Supreme Court’s approach to Title VII as shown through relevant case law).

\textsuperscript{60} Hollman, supra note 26, at 6 (contending that as of 2008, “the WRFA coalition continues to include a broad array of supporters”).


\textsuperscript{62} Foltin, supra note 1, at 72.

\textsuperscript{63} Letter from Laura W. Murphy, Director, ACLU & Christopher E. Anders, Legislative Counsel, ACLU, to unnamed Senators on the Harmful Effect of S. 893, the Workplace Religious Freedom Act, on Critical Personal and Civil Rights (June 2, 2004), available at http://www.aclu.org/religion-belief/aclu-letter-harmful-effect-s-893-workplace-religious-freedom-act-critical-personal-a. It must be noted that the American Civil Liberties Union (ACLU) raised this specific point of opposition in relation to the more comprehensive version of the WRFA that predated Senator Kerry’s “targeted” version before the Senate in 2008. Gibson Interview, supra note 41. The ACLU now supports the “targeted” version of the WRFA. Id.
justification for harassing gays in the workplace, and that WRFA will be used to limit access to reproductive healthcare.”  

Similarly, for other detractors, the WRFA’s requirements have the potential to place too great a burden on a protected employee’s coworkers and employer. This concern is reflected in the opinion of one commentator who maintains that “the Act would substantially enlarge the duty of employers to accommodate their religious employees, which would impose greater demands on coworkers to acquiesce to religious accommodation requests.” Based on this specific criticism, it is accurate to maintain that some opponents of the WRFA perceive the protections it seeks to offer as outweighed by the suspected economic realities of its enactment.

Proponents of the WRFA have responded to the above criticisms by implying that such concerns are largely misplaced and misguided. As one group of supporters has suggested, the WRFA will not make it easier for employees to infringe on the rights of other individuals during their employment because of embedded provisions in the proposed law precluding such outcomes. Particularly, as the latter group has emphasized, “WRFA’s requirement that an accommodation only be

64. Foltin, supra note 1, at 72.
66. See Bohn, supra note 55 (stating, in reference to concerns over past versions of WFRA, that “[t]he ACLU and the U.S. Chamber of Commerce were concerned other employees might be forced to carry additional workloads to accommodate co-workers, and that it would allow religious viewpoints to interfere with a secular workplace”).
68. Sonne, supra note 27, at 1023-24 (demonstrating, by way of a hypothetical, the types of potential financial and other types of burdens that the WRFA may impose upon employers).
69. See, e.g., Kellner, supra note 65 (“WRFA provides a modest level of protection to ensure that American workers are no longer arbitrarily forced to choose between their faith and their livelihood.”); Workplace Religious Freedom Act (S. 677; H.R. 1445), Some Questions and Answers, INST. FOR PUB. AFF., (Jan. 3, 2007) http://www.ou.org/public_affairs/article/workplace_religious_freedom_act_some_questions_and_answers [hereinafter Questions and Answers] (suggesting that concerns surrounding protected workers burdening third parties are unfounded under WRFA).
70. See Questions and Answers, supra note 69.
granted when it will not impose a significant difficulty or expense on the employer ensures that employers must be able to deliver their services and products to their customers and clients.” In essence, such a position seems to suggest that, while the WRFA seeks to promote the view “that the employer has an affirmative and ongoing obligation to reasonably accommodate an employee’s religious practice and observance,” this responsibility does not have to be pursued at the complete detriment of the employer. Such an outcome is possible under the WRFA because the proposed Act’s amended interpretation of Title VII’s undue hardship provision suggests that the extent of accommodation required will be judicially reviewed and evaluated in a manner that is “context specific.” Thus, some proponents of the WRFA refute the claim that employers will bear too great of a burden in accommodating the religious practices of their employees under the proposed Act by highlighting that courts will be able to examine the specific facts of each accommodation if necessary.

Apart from the judicial means through which accommodation concerns may be addressed under the WRFA, some of its supporters imply that any difficulties that may be produced by its requirements will likely solve themselves in an almost organic manner as opposed to in the courts. This perspective is illustrated in how one particular group

71. See id.
72. Foltin, supra note 1, at 71.
73. See id.
74. Questions and Answers, supra note 69. See also Foltin, supra note 1, at 72. As Foltin explained:

A central component of WRFA, as is the case under current accommodation law, is its balancing test, albeit with a modification of the operative definitions of ‘reasonable accommodation’ and ‘undue hardship.’ Nothing in that change in definition will alter the fact that courts are quick to recognize that workplace harassment imposes a significant hardship on employers in various ways . . .

Id.

75. See Foltin, supra note 1, at 72 (stating that “the threshold question of sincerity as to religious belief must be resolved as a question of fact”); see also Caplen, supra note 27, at 623 (arguing that the WRFA will afford “an appropriate balance between protecting religious liberty and reconciling faith within the workplace”).
76. See Questions and Answers, supra note 69.
envisions a specific practical effect of the WRFA in the workplace and on employee-employer interaction. The group has maintained:

A typical scenario which the passage of WRFA would address is with regard to permitting the more flexible work schedules religious employees often need. If, for example, an employee needed to leave early on Friday afternoon in order to observe the Jewish sabbath [sic] or a Christian wished to take off from work on Good Friday, and was willing to work late nights earlier in the week to ensure that all of the tasks for which he/she was responsible were completed (ensuring that there would be no impact upon the employer’s ‘bottom line’), WRFA would require the employer to grant such an accommodation and not insist that worker be present on Friday.

Overall, it appears fair to assert that this envisioned scenario in the workplace is premised on the view that the WRFA will encourage the employee and the employer to interact in a manner that is not only “reasonable” but reflective of the types of workplace accommodation Congress aimed to create in the past through Title VII. As such, under the proposed Act, the employer, and it appears the employee as well, will “bear the responsibility of making actual, palpable efforts to arrive at an accommodation.”

Coupled with these defenses of the WRFA, some backers also contend that the proposed legislation “will [not] somehow empower employees to act in ways that hurt others in the workplace or cause third

77. See BACKGROUNDER, supra note 29.
78. Id.
79. See Foltin, supra note 1, at 76.
80. See Caplen, supra note 27, at 584-85; see also Foltin, supra note 1, at 76 (stating that in order to “assur[e] that employers have a meaningful obligation to reasonably accommodate their employees’ religious practices, WRFA will restore to Title VII’s religious-accommodation provision the weight that Congress originally intended”).
81. See Questions and Answers, supra note 69 (noting that employees will not be able to demand any accommodation they please).
parties to be denied needed services." As a basis for this assertion, some point to the fact that harassment law has mechanisms in place that actively preclude an employee from criticizing or distracting a coworker or a third party in an impermissible manner based on religious beliefs or observance. Furthermore, as other supporters argue, the language and overall spirit of the Act provide coworkers and third parties the needed protections from unwanted harassment or refusals of service by an employee based on religious beliefs. Specifically, as one group has maintained, "WRFA's requirement that an employee cannot receive an accommodation which interferes with the performance of a job's 'essential functions' also protects third parties against adverse affects [sic], especially in the health services context." In other words, all that the WRFA requires in a situation in which an employer must decide whether to allow an employee to refuse services to a customer or patient based on religious observance is if the refusal presents "a palpable significant difficulty or expense" to the employer. Consequently, it would seem that the employee remains accountable under the language of the WRFA for actions that exceed the latter standard in interactions with third parties in the workplace.

Given these overall arguments, one would be remiss not to mention one of the central and growing foundations upon which some proponents of the WRFA appear to partially base their arguments in favor of stronger legal protections for religious expression in the workplace. Specifically, the nation has experienced a growth in

83. Id. at 24.
84. Id. at 19.
85. See Questions and Answers, supra note 69.
86. Id.
87. Foltin, supra note 1, at 73.
88. See Questions and Answers, supra note 69 (stating that the WRFA will not interfere with civil rights or health services of third parties); see also Caplen, supra note 27, at 616-21 (disputing the concerns of the WRFA opponents regarding the potential extent of employee protections in the healthcare arena by highlighting judicial treatment of the issue under Title VII).
89. See Foltin, supra note 1, at 68 (asserting that one indication for the need for the WRFA is demonstrated through "our nation's increasing diversity, marked by a broad spectrum of religious traditions, some of which may clash with workplace parameters that do not take into account the religious observances of immigrant communities . . .").
religious pluralism\textsuperscript{90} and an increase in the presence of individuals from a range of faiths in disparate areas of employment.\textsuperscript{91} "In fact the American Religious Identification Survey 2001 (ARIS) noted the portion of the American adult population classifying itself as Christian declined from 86\% to 77\% between 1990 and 2001."\textsuperscript{92} Another survey seems to have indirectly confirmed the latter findings,\textsuperscript{93} stating, "[m]embers of Protestant churches now constitute only a slim majority (51.3\%) of the overall adult population."\textsuperscript{94} Furthermore, the size of some of the populations of those adhering to faiths other than Christianity has more than doubled since the decade before and at the turn of the 21st century.\textsuperscript{95} In essence, based on such overall findings, it seems fair to contend that the American workplace is becoming increasingly heterogeneous in terms of represented faiths.\textsuperscript{96}

The aforementioned perspectives are clearly substantial in considering the potential significance of the WRFA's protections given that an increasing sense of religious diversity in the workplace naturally creates a need for ensuring that employers will reasonably adjust the work environment to appropriately accommodate the religious beliefs of employees.\textsuperscript{97} Such adjustment could continue to prove difficult for employers\textsuperscript{98} based on the reality that many may be effectively acclimated "to accommodating only traditional Christian workers' requests"\textsuperscript{99} rather

\textsuperscript{90} See Foltin, supra note 1, at 68.
\textsuperscript{91} See Garry Rollins, Religious Expression in the Growing Multicultural Workplace, 2 J. DIVERSITY MGMT. 1, 3 (2007), available at http://www.cluteinstitute-onlinejournals.com/PDFs/2007174.pdf (providing a table of data demonstrating the rise in the number of individuals participating in various faiths in the nation in relatively recent years).
\textsuperscript{92} Id. at 2.
\textsuperscript{94} Id.
\textsuperscript{95} See Rollins, supra note 91, at 3.
\textsuperscript{96} Id.
\textsuperscript{97} See Foltin, supra note 1, at 68.
\textsuperscript{98} See Rollins, supra note 91, at 2.
\textsuperscript{99} Id.
than those raised by members of other faiths. To complicate matters of accommodation in the American workplace further, tensions between certain religious groups in "the post-September 11th world" have raised concerns that discrimination of employees based on faith has become an ever-present reality. As one leading proponent of the WRFA highlighted, there was and has been "latent animosity toward some religious traditions after the September 11 attacks, a phenomenon evidenced by a particularly severe spike in religious claims after the attacks, when Sikh and Muslim Americans faced greater hostility at work." In fact, the current number of complaints of workplace discrimination that have been filed with the Equal Employment Opportunity Commission by Muslims, in particular, "exceeds even the amount filed in the year after the 9/11 terrorist attacks." Based on such a reality, and the overall growth in national religious pluralism, it seems fair to maintain that the WRFA is needed to ensure workplace protections in today's society more than ever.

II. CASE LAW DEMONSTRATIVE OF THE NEED FOR THE WRFA OR WRFA-LIKE PROTECTIONS FOR THE RELIGIOUS EXPRESSION OF PRISON EMPLOYEES

Despite the growing need for religious protections in the workplace and the potential coverage offered by the WRFA discussed above, the proposed legislation appears to have the potential of failing to

100. See id., at 2; see also Zaheer, supra note 59, at 497-98 (underscoring the fact that increased religious diversity poses accommodation issues in employment situations).
101. Zaheer, supra note 59, at 497.
102. See Rollins, supra note 91, at 2
103. Foltin, supra note 1, at 68.
105. Id.
106. See Foltin, supra note 1, at 68. ("Based on figures released by the Equal Employment Opportunity Commission, the number of claims of religious discrimination in the workplace filed for the fiscal year ending on September 30, 2006, as compared to the fiscal year ending on September 30, 1992, reflect a startling increase of over 75 percent.").
offer a particular group of workers sufficient and warranted workplace coverage. Specifically, recent court decisions restricting the religious expression of prison workers while on the job have underscored the fact that safety concerns can effectively trump the freedom of religious expression of these specific employees, especially under the weak undue hardship standard associated with Title VII. As highlighted by the decisions issued by federal courts in E.E.O.C. v. GEO Group, Inc. and Booth v. Maryland, prison workers have been exposed to the apparent tension in the law between the desire to reasonably accommodate the religious practices of these employees and the need to maintain safety and consistency in the workplace. While safety goals are certainly justifiable and important within a prison, such concerns seem misguided as they relate to the religiously-motivated clothing and

107. See, e.g., E.E.O.C. v. GEO Group, Inc., 616 F.3d 265 (3d Cir. 2010) (holding that a private employer did not, under the dictates of Title VII of the Civil Rights Act of 1964, have to allow female workers to wear Muslim headscarves during the course of employment at a prison because of general safety issues); Booth v. Maryland, 327 F.3d 377 (4th Cir. 2003) (implying judicial acceptance of the security concerns inherent in a prison’s adherence to a grooming policy that resulted in prohibiting a prison worker from wearing religiously-motivated dreadlocks in the workplace).

108. See GEO Group, 616 F.3d 265; Booth, 327 F.3d 377.


110. 616 F.3d 265 (3d Cir. 2010).

111. 327 F.3d 377 (4th Cir. 2003).

112. See, e.g., GEO Group, 616 F.3d at 275.

The EEOC has an enviable history of taking steps to enforce the prohibition against religious discrimination in many forms and its sincerity in support of its arguments against the application of the no headgear policy to Muslim employees wearing khimars is evident. On the other hand, the prison has an overriding responsibility to ensure the safety of its prisoners, its staff, and the visitors. A prison is not a summer camp and prison officials have the unenviable task of preserving order in difficult circumstances.

Id.

hairstyles of prison workers.\textsuperscript{114} This claim, surrounding the arguable over-emphasis on security concerns in prisons in this specific area, is rooted in the United States' long recognition of the intrinsic worth of religious freedom\textsuperscript{115} as reflected in the overall spirit of the First Amendment.\textsuperscript{116} Denying prison workers the opportunity to express themselves in the workplace appears inherently incompatible with the latter historical and legal tradition. This position is magnified further in that certain courts do not seem to rely on or require clear facts to support claims that the religious garb or grooming practices of prison workers disrupt the overall safety of prison facilities.\textsuperscript{117} Consequently, prisoners appear to receive greater protections for their religious garb and

\begin{itemize}
\item \textsuperscript{114} See \textit{GEO Group}, 616 F.3d at 277 (Tashima, J., dissenting) ("The majority, thus, effectively relieves GEO, as the employer and moving party asserting safety concerns, of the burden of proving the existence of the asserted safety concerns, as well as of the fact and magnitude of the asserted hardship in accommodating plaintiffs religious needs.").

\item \textsuperscript{115} See Chris Markos, Note, \textit{Empty Threats and Saber Rattling: Why the International Religious Freedom Act Provides a Better Solution to Combating Terrorism and Promoting Stability in Pakistan}, 11 \textit{RUTGERS J. L. & RELIGION} 177, 178-79 (2009) (implying that America's historical commitment to religious freedom is the basis for and, to some extent, reflected in the nation's commitment to this ideal internationally).

\item \textsuperscript{116} See, \textit{e.g.}, Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

\item \textsuperscript{117} See, \textit{e.g.}, \textit{GEO Group}, 616 F.3d at 274-77 (relying on broad assertions of safety concerns in affirming summary judgment in favor of defendants); Booth v. Maryland, 327 F.3d 377, 381 (4th Cir. 2003) (suggesting that the generalized security issues cited by defendants were sufficient in overcoming the plaintiff's claims).
\end{itemize}
grooming practices than prison workers,\textsuperscript{118} despite safety concerns surrounding general prisoner religious accommodation.\textsuperscript{119}

The noted inconsistencies between accommodating religious expression in America and sacrificing such a pursuit for prison workers for the sake of vague safety concerns\textsuperscript{120} is relevant to the WRFA because it highlights a significant challenge that will apparently remain for courts if the WRFA is passed.\textsuperscript{121} Essentially, courts will have to decide whether the heightened standard of “significant difficulty” that the WRFA seeks to place on employers\textsuperscript{122} effectively protects the freedom of prison employees to wear certain religiously-motivated clothing, hairstyles, and facial hair while on the job. In other words, courts will have to confront the issue of whether this new standard is or is not overcome by the type of safety concerns that have proven to cause such religious expression claims to fail in the recent past.\textsuperscript{123} While such a task will likely prove challenging for courts in light of a strong emphasis in the law “that

\textsuperscript{118} This position finds support through the language of RLUIPA, 42 U.S.C. §§ 2000cc-1(a)(1), (2) (2006), which maintains that “[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution,” unless the burden furthers “a compelling governmental interest,” and does so by “the least restrictive means.” Cutter v. Wilkinson, 544 U.S. 709, 712 (2005) (quoting RLUIPA). Further background material surrounding RLUIPA and its potential to help guide the enactment of the WRFA so as to more adequately protect the religious expression rights of prison employees in the workplace are discussed later in this Note. See discussion infra Part III.


\textsuperscript{120} See GEO Group, 616 F.3d at 277-78 (Tashima, J., dissenting) (suggesting that a reasonable jury could find that the ambiguous security concerns of prison officials should not be enough to overcome the strong interests the specific prison employees at issue had in religious expression through clothing choices).

\textsuperscript{121} See, e.g., id. at 274-77 (relying on broad assertions of safety concerns in affirming summary judgment in favor of defendants); Booth, 327 F.3d at 381 (suggesting that the generalized security issues cited by defendants were sufficient in meeting low standard applicable to case).

\textsuperscript{122} H.R. 1431, 110th Cong. § 2(a)(4) (2007).

\textsuperscript{123} See, e.g., GEO Group, 616 F.3d 265 (holding that a private employer did not, under the dictates of Title VII of the Civil Rights Act of 1964, have to allow female workers to wear Muslim headscarves during the course of employment at a prison because of general safety issues).
prisons have compelling interests in maintaining institutional security and disciplining offenders,” the heightened standard the WRFA advances suggests that security concerns in prisons can and should be overcome in situations where the employee’s rights of expression are particularly compelling.

Thus, given the substantial weight that the WRFA appears to place on accommodating the religious practices of employees when feasible, it is submitted here that, if the WRFA is passed by Congress, courts must not merely accept “conclusory statements and post hoc rationalizations” from prison officials regarding safety concerns. Instead, courts should apply the WRFA’s proposed heightened standard in accommodating the workplace religious expression of prison employees in the “appropriately balanced way.” This balancing could entail case-by-case analysis of the manner in which a given prison employee chose to express his or her faith through garb or grooming and the degree to which such a manifestation of belief created or did not create a truly legitimate security concern. While certainly inclusive of a “sensitivity to security concerns” in prisons, such an approach would ideally encourage courts to be more measured and cautious in potentially sacrificing a prison employee’s rights of religious expression in the workplace. Hence, if the WRFA becomes law and its “significant difficulty” standard is formally required of employers, courts should interpret the Act as dictating that proffered safety concerns in prisons


125. See GEO Group, 616 F.3d at 277-78 (Tashima, J., dissenting) (suggesting that a reasonable jury could find that the vague security concerns of prison officials should not be enough to overcome the strong interests the specific prison employees at issue had in religious expression through clothing choices).

126. Murphy v. Mo. Dept. of Correction, 372 F.3d 979, 989 (8th Cir. 2004) (quoting Hamilton v. Schriro, 74 F.3d 1545, 1554 (8th Cir. 1996)).


128. See GEO Group, 616 F.3d at 284-90 (Tashima, J., dissenting) (implying through the facts of the case that there was a need to examine both of the proffered security interests in light of apparently significant religious expression interests of the employees).

129. Cutter, 544 U.S. at 722.

130. See GEO Group, 616 F.3d at 288-89 (Tashima, J., dissenting) (suggesting that the majority too readily accepted vague security interests of the prison).
must be sufficiently convincing to overcome prison workers’ constitutionally-based rights of religious expression in the work environment.\footnote{131}

The need for a more balanced and accommodating approach to the religious expression of prison workers during the course of their employment has been clearly highlighted by two circuit court cases: \textit{E.E.O.C. v. GEO Group, Inc.}\footnote{132} and \textit{Booth v. Maryland.}\footnote{133} The cases, one which specifically centered on prison prohibitions against employees wearing certain religious garb\footnote{134} and the other involving an officer’s violation of prison grooming policies,\footnote{135} underscore the degree of deference some courts have granted prison officials in their assertions that certain religious expression in the workplace poses security issues.\footnote{136} In examining both the facts and reasoning in each of the cases, it is clear that certain courts consider the present undue hardship test advanced by Title VII as a relatively easy bar for prison officials to overcome.\footnote{137} As argued throughout this Note, that fact appears to disregard American society’s longstanding emphasis on the fundamental freedom of religious expression amongst the nation’s citizenry.\footnote{138} These cases provide prime examples of how the heightened standard advanced by the WRFA can

\begin{itemize}
\item \textit{See id. at 286-89 (implying that the prison employees made enough of a showing of religious expression interests to overcome safety concerns alleged under Title VII).}
\item \textit{616 F.3d 265.}
\item \textit{327 F.3d 377 (2003).}
\item \textit{GEO Group, 616 F.3d at 267.}
\item \textit{See Booth, 327 F.3d at 379.}
\item \textit{616 F.3d at 273-77 (ruling that a prison official’s particular safety concerns with respect to head coverings, though potentially based in speculation, were sufficient to meet the undue hardship test of Title VII); Booth, 327 F.3d at 381 (holding that the prison officials’ safety concerns were adequate to pass the rational basis test).}
\item \textit{GEO Group, 616 F.3d at 273; Booth, 327 F.3d at 381. As indicated earlier in this Note, Booth pertained to a plaintiff’s religious expression claims that were not brought under Title VII. Id. at 378. However, the Fourth Circuit’s acceptance of the generalized safety concerns of the prison are indicative of the problems associated with the weak protections offered by Title VII. Id. at 381.}
\item \textit{Richard Albert, American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective, 88 MARQ. L. REV. 867, 923-25 (2005) (discussing the historical importance of religious freedom afforded by “separationism” in America and its virtues at both a personal and governmental level).}
\end{itemize}
and should offer more protections for prison workers. Additionally, the holdings and approach in both Booth and GEO Group could potentially offer courts the opportunity to consider how the significant difficulty standard proposed by the WRFA would or would not have altered the outcomes of these cases given the apparent tension between security and religious expression interests.

In Booth, the plaintiff was Jonathan F. Booth, a correctional officer and state employee, who contended, in part, that he was religiously discriminated against by the state. Booth’s claim emerged after he was reprimanded by his supervisors for violating the policies for

139. It must be acknowledged that some courts have closely examined the legitimacy of security concerns offered by prisons in cases involving employee garb or grooming policies, albeit in contexts outside of Title VII. For example, in Rourke v. N.Y. State Dep’t of Corr. Servs., 615 N.Y.S.2d 470 (N.Y. App. Div. 1994), the court responded to a prison’s requirement that a Native American employee, who wore his hair long for religious reasons, cut his hair for the sake of security and other reasons. Id. at 472. The court stated: “Perhaps the most unassailably convincing evidence in this case is the fact that petitioner himself was allowed, by his former supervisor, to wear his hair long for 14 months, and in all this time respondents are unable to point to a single incident illustrative of any problem with security . . . .” Id. at 473. As a result, the court rejected the prison’s reasoning for its requirement. Id. See also Francis v. Keane, 888 F. Supp. 568 (S.D.N.Y. 1995) (denying prison’s motion for summary judgment due to lack of sufficient evidence as to security issues where two Rastafarian prison employees brought a claim under the Religious Freedom Restoration Act of 1993 because the prison instructed them to change their religiously-motivated hairstyles).

140. See GEO Group, 616 F.3d at 274-77 (relying on broad assertions of safety concerns in affirming summary judgement in favor of defendants); Booth, 327 F.3d at 381 (suggesting that the generalized security issues cited by defendants were sufficient in overcoming the plaintiff’s claims).

141. Booth, 327 F.3d at 378.

142. It is important to note in this discussion that Booth presented a successful claim in this particular case. The Fourth Circuit held “that evidence in the record showed that the Department had previously granted other officers religious exemptions to the hair policy . . . [and] the Department applied a facially neutral policy in an unconstitutional manner.” Booth v. Maryland, 337 F. App’x. 301, 303 (4th Cir. 2009). As a result of this holding, “[t]he parties thereafter entered into a settlement agreement in which the State of Maryland agreed to provide Booth a religious accommodation from its grooming policy.” along with other concessions. Id. at 303. As the subsequent analysis presented in this Note expresses, despite this positive result for Booth, the security issues presented in the case remain troubling.

143. See Booth, 327 F.3d 377.
employee grooming at the prison facility in which he worked. Booth’s specific workplace violation surrounded his decision to “wear[] his hair in dreadlocks” as an apparent reflection of his Rastafarianism. In seeking to explain his maintenance of this particular hairstyle to prison officials, Booth claimed that “his Rastafarian religion required him to wear his hair in dreadlocks and requested a reasonable accommodation to wear his hair in accordance with his religious beliefs.” Based on these overall facts, it would not be a stretch for one to maintain that, at least to some degree, Booth’s religious beliefs and faith-based motivations for choosing to wear his hair in dreadlocks were genuine.

Furthermore, Booth was able to highlight in his suit what appeared to be rather compelling claims that the grooming policy at issue was not applied equally by the State and that the discipline he received for his religiously motivated hairstyle was somewhat atypical. The opinion surmises Booth’s assertion against the prison in the following manner:

[T]he defendants violated his First Amendment rights by refusing his request for an accommodation to wear his hair in modified

144. See id.
145. Id. at 378.
146. Id. at 379. In particular, Rastafarian dreadlocks have been described as “rope-like strands” of hair. Donald L. Beschle, Paradigms Lost: The Second Circuit Faces the New Era of Religion Clause Jurisprudence, 57 BROOK. L. REV. 547, 557 n.58 (1991) (quoting Benjamin v. Coughlin, 905 F.2d 571, 573 (2d Cir. 1990)). The significance of wearing dreadlocks to some Rastafarians appears to be “that dreadlocks are integral not only to their religious identity but to their whole racial and cultural identity . . . .” Derek O’Brien & Vaughan Carter, Chant Down Babylon: Freedom of Religion and the Rastafarian Challenge to Majoritarianism, 18 J.L. & RELIGION 219, 232 (2002).
147. Booth, 327 F.3d at 379.
148. Id.
149. In fact, Booth, in a separate and later case involving alleged discrimination by correctional facility officials, “filed a Title VII claim . . . alleging failure to accommodate, disparate treatment, hostile religious environment, and retaliation against the Department.” Booth v. Maryland, 337 F. App’x 301, 305 (4th Cir. 2009). These claims appeared to have been based primarily on Booth’s belief that his choice to wear dreadlocks to work was the reason for being “removed from the position of acting lieutenant” at the facility. See id. at 308-12.
150. Booth, 327 F.3d at 380.
151. Id.
dreadlocks, that the request was not unreasonable because similarly situated females are allowed to wear their hair braided and substantially longer than the dreadlocks he wears, and that the defendants have not enforced the policy against approximately thirteen similarly-situated employees who have violated the policy but who have not been disciplined.152

In reference to the disparate treatment of other employees, Booth specifically claimed that the defendants had permitted two male employees, one Jewish and the other of the Sikh faith, to maintain long facial hair.153 Booth contended that the defendants also allowed the Sikh to wear a turban during the course of his employment and the employee who was Jewish to wear “long sideburns.”154 Thus, the totality of Booth’s claim asserted that his efforts to maintain the hairstyle urged by his faith were not completely incompatible with existing employee accommodations at the facility.155 Such an assertion was reasonable based on the apparent manner in which the prison had allowed other employees to wear certain hair and facial hair styles in accordance with either their beliefs or gender.156

Despite the compelling nature of the above claims and the defendants’ past accommodations in the workplace, the court appeared to favor the state’s security-based arguments.157 While the applicable part of the opinion focuses primarily on pleading issues involving claims under the First Amendment and Title VII,158 the court suggests that there was no basis for assuming that the grooming policies adopted by the defendants were created in order to discriminate against the religious expression rights of employees adhering to certain faiths.159 The court

152. Id.
153. Id. at 380-81.
154. Id. at 381.
155. See id. at 380-81.
156. Id.
157. See id. at 381.
158. See id. at 382 (discussing the fact that the district court erred having “implicitly ruled that Booth had not made an ‘as applied’ challenge to the defendants’ application of the policy to him because such a challenge can only be brought under Title VII”).
159. See id. at 381.
contends, "There is no evidence that the Division developed the policy to regulate or prohibit religious activities, including Booth's practice of Rastafarianism, and the defendants presented persuasive evidence that DCD 50-43 was likely adopted for the neutral secular purposes of promoting public safety, discipline, and \textit{esprit de corps}.'\textsuperscript{160} Although it is true that the court underscored in its opinion that the district court erred in failing to consider the fact that the plaintiff offered evidence suggesting the defendants' grooming policy was not applied equally,\textsuperscript{161} the fact remains that the defendants and the court alike seemed to justify the policy in question on the grounds of general statements pertaining to safety.\textsuperscript{162} Furthermore, the court failed to either list or analyze the proffered security concerns of the defendants and impliedly accepted their safety justifications as sufficient.\textsuperscript{163} This result is alarming given the idea that the prison essentially sacrificed Booth's religious expression rights in the workplace for the sake of broad and undefined security concerns.\textsuperscript{164}

In conjunction with the above assertions, the subjection of Booth's rights of religious expression to certain employment policies becomes even more unsettling when one examines the actual security interests that were maintained by the defendants before the district court.\textsuperscript{165} Specifically, the defendants made what appears to have been a rather vague statement as to the safety threats that the plaintiffs dreadlocks presented in the prison context.\textsuperscript{166} The defendants stated "that requiring guards to have traditional military or law enforcement hairstyles allows them to be distinguished from prisoners during

\textsuperscript{160} \textit{Id.} "DCD 50-43" represents the "dress code and grooming policy" of "Maryland's Department of Public Safety and Correctional Services, Division of Pretrial Detention and Services." \textit{Id.} at 378-379.

\textsuperscript{161} \textit{See id.} at 381 ("Booth presented at least some evidence that the legitimate secular purposes underlying the policy have been abandoned in a manner that favors other religions over his religion and, therefore, that the policy has been applied to him in an unconstitutional manner.").

\textsuperscript{162} \textit{Id.}

\textsuperscript{163} \textit{See id.}


\textsuperscript{165} \textit{See id.}

\textsuperscript{166} \textit{See id.}
attempted uprisings or escapes. While the defendants did not offer any other justification related directly to security concerns, the court accepted the defendants' generalized rationale on the grounds that it satisfied the "low burden" required of the defendants. While it is true that the district court subjected the defendants to the rational basis test and not the undue hardship test of Title VII in its decision, the undue hardship standard would have yielded a similar ruling had it been applied. The latter contention is rooted in the reality that the district court openly acknowledged in its opinion that "the defendants' explanation that guards with dreadlocks might be confused with prisoners during an uprising or attempted breakout might be considered questionable and its elaboration in the present record of its policy rationales is sparse." In essence, based on such a recognition and the district court's subsequent acceptance of the sufficiency of the defendants' justifications, it seems the defendants would have met the present "de minimis cost" showing required by Title VII.

In conjunction with the above decision highlighting potentially minimal protections for the religiously motivated hairstyles of prison employees under Title VII, it is also crucial to consider the similarly weak protections afforded to prison workers as to faith-based garb. In *E.E.O.C. v. GEO Group, Inc.*, from the Third Circuit, "a class of

167. *Id.* at 398.
168. *See id.* at 398-99 (stating that "the defendants offer testimony that . . . [military] hairstyles engender respect from prisoners and foster esprit de corps") (citation omitted).
169. *Id.* at 399.
170. *See id.* at 398 ("The challenged rules are rationally related to the division's legitimate interests in public safety, discipline and esprit de corps.").
171. *See Webb v. Philadelphia*, 562 F.3d 256, 259-60 (3d Cir. 2009) ("An accommodation constitutes an "undue hardship" if it would impose more than a de minimis cost on the employer.") (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).
173. *See id.*
175. *See, e.g., E.E.O.C. v. GEO Group, Inc.*, 616 F.3d 265, 275 (3d Cir. 2010) (holding that, despite the apparently sincere religiously-motivated desires of prison employees to wear head coverings at work, the prison’s security interests were sufficient to outweigh the employees’ interests under Title VII).
176. 616 F.3d 265 (3d Cir. 2010).
Muslim women employees" challenged the "dress code" for prison workers at the prison in which they worked.\textsuperscript{177} In particular, this policy required that employees refrain from wearing various apparel that would effectively cover one's head during workplace responsibilities.\textsuperscript{178} The employer claimed that the policy functioned to keep employees from wearing "khimars" even though some consider these "head coverings"\textsuperscript{179} to be "required by the Islamic religion."\textsuperscript{180} The Muslim women saw the policy as an affront to their rights of religious expression in the workplace\textsuperscript{181} and claimed that the uniform requirements "violated Title VII's prohibitions on religious discrimination" as it did not grant "them an exception."\textsuperscript{182}

A close examination of the employer's dress code and the specific facts that formed the background of the case is quite disturbing and raises concerns about how insensitive to religious expression employee clothing policies can potentially be in the prison environment. In particular, one of the Muslim employees in GEO Group was hired as a nurse in the prison and was assured upon hiring that her wearing of a khimar would not be problematic.\textsuperscript{183} She suggested in a very clear manner, at the time she was hired, that her decision to wear this form of religious garb was imperative in her religion and that she would not cease such an expression even for the sake of her employment.\textsuperscript{184} After being hired and permitted to wear her khimar in the prison facility for what appears to have been less than a year, this employee took a leave of absence from work.\textsuperscript{185} She was informed afterward that she would be

\textsuperscript{177} Id. at 267-68.
\textsuperscript{178} See id.
\textsuperscript{179} Id. "The headscarf (a khimar or hijaab) is a traditional headcovering worn by Muslim women." Webb v. Philadelphia, 562 F.3d 256, 258 (3d Cir. 2009). For further background discussion on the khimar and its significance in the Muslim faith, see Alexandra Marin, Note, Religious Discrimination or Effective Law Enforcement? The Appeal of a Muslim Police Officer to Wear Her Khimar On-Duty Awaits Decision by Federal Judges: Kimberlie Webb v. City of Philadelphia, Civil Action No. 07-3081 (March 14, 2008), 10 Rutgers J. L. & Religion 183, 184 n.11 (2008) (providing a general discussion of religious origins of the khimar).
\textsuperscript{180} GEO Group, 616 F.3d at 268.
\textsuperscript{181} See id.
\textsuperscript{182} Id. at 267.
\textsuperscript{183} See id. at 268.
\textsuperscript{184} See id. at 268-69.
\textsuperscript{185} Id.
able to return to her job but could no longer work in her head covering. After resisting these terms for resuming her active employment at the prison, she was summarily fired for failing to comply with her employer’s orders.

Similarly, two other female Muslim employees at the facility in question were informed in 2005 that they were not permitted to wear their head coverings in the prison during the course of their employment. The instruction was a surprise to one of these employees. She had interviewed for her position at the prison while wearing both a “khimar and a veil.” The record suggests that the individual who interviewed her for the position inquired whether she would be willing to work without the veil – a question to which she responded affirmatively and subsequently seems to have complied with during the course of her employment. Apparently this interview did not include any suggestion that the woman’s khimar posed any problems for her employment, and she wore the khimar at the facility “for the first five years of her employment.” She learned from a coworker in 2005 that she could no longer wear the head covering to the prison as a result of the facility’s clothing policy. The prison warden subsequently told her that she would be fired if she failed to comply. The employee took a leave of absence from her job due to the strain the policy caused her. As a product of the constraints of the facility’s policy, this employee eventually returned to work and complied with the dictates of the prison’s restrictive uniform guidelines. A similar result also occurred in the case of the woman who elected to adorn the “underscarf” with

---

186. Id.
187. See id.
188. Specifically, one of the two women wore a khimar to work, while the other was described in the record as adorning a “a triangle shaped underscarf that she would tie around her head.” Id. at 269.
189. See id.
190. Id.
191. See id.
192. Id.
193. Id.
194. Id.
195. Id.
196. Id.
197. Id.
her uniform. This employee chose to forgo wearing her head covering after the warden allegedly informed her she would be “suspended without pay” if she did not follow the policy in question.

After suit was filed on the claim that the clothing policy of the facility “violated Title VII’s prohibitions on religious discrimination,” the prison sought to justify its restrictive policies primarily on the grounds of safety concerns. Specifically, the warden testified at trial that the reasons for the head covering prohibition centered on the fear that headgear could be used to conceal contraband and weapons; make it difficult to differentiate between prisoners and workers on the facility’s monitoring systems; and, at least in the case of khimars, be used as weapons themselves. GEO Group, Inc., the “private company that was contracted to run” the prison at issue, also added that the clothing policy for prison workers helped to foster a degree of consistency in appearance among employees. In essence, the facility used these largely security-based justifications as a means of attempting to prove that granting certain exemptions to Muslim female workers under the clothing policy was not imperative given what amounted to an “undue hardship defense” to allowing such accommodation.

In considering the various interests at stake, the Third Circuit ultimately ruled in favor of the prison facility, accepting as sufficient the weight of its security concerns in relation to the infringement of the uniform policy on the employee’s rights of religious expression in the workplace under Title VII. While the court did concede that the

---

198. Id.
199. Id.
200. See id.
201. Id. at 270.
202. See id.
203. Id. at 272.
204. Id.
205. Id.
206. Id. at 267.
207. Id.
208. See id. at 273.
209. See id. at 274.
210. Id. at 273.
211. See id.
212. Id. at 277.
213. See id. at 270-77.
interests on both sides made "this a close case,"\textsuperscript{214} it stated that "the kind of delicate balance called for"\textsuperscript{215} between the competing arguments had to involve, as the United States Supreme Court suggested in \textit{Bell v. Wolfish},\textsuperscript{216} "only limited inquiry into prison management because '[t]he wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.'"\textsuperscript{217} With this considerable degree of deference afforded to the prison, the Third Circuit then proceeded to rely\textsuperscript{218} on its own 2009 ruling in \textit{Webb v. City of Philadelphia}.\textsuperscript{219} The court characterized \textit{Webb} as asserting "that notwithstanding the sincere religious beliefs of the plaintiff police officer of the need to wear a khimar, that belief was subordinate to the police department’s policy prohibiting the wearing of a khimar because"\textsuperscript{220} of the pressing importance of security.\textsuperscript{221} As such, the \textit{GEO Group} court highlights the testimony of the wardens of the facility at issue,\textsuperscript{222} implying that they and GEO were "entitled to attempt to prevent"\textsuperscript{223} even "a small threat of the asserted dangers"\textsuperscript{224} potentially posed by khimars.\textsuperscript{225} Thus, while the court suggested that the case was "close,"\textsuperscript{226} its apparent deference to notions of safety seem to have made this an easier case for the court than is stated.\textsuperscript{227} The latter contention is supported by the court’s own acknowledgement in the opinion, which states that "[a] religious accommodation that creates a genuine safety or security risk can undoubtedly constitute an undue hardship for an employer-prison."\textsuperscript{228} This position can be construed, therefore, as

\begin{footnotesize}
\begin{itemize}
\item 214. \textit{Id.} at 275.
\item 215. \textit{Id.}
\item 216. 441 U.S. 520, 562 (1979).
\item 217. \textit{GEO Group}, 616 F.3d at 275 (quoting \textit{Bell}, 441 U.S. at 562).
\item 218. See \textit{id.}
\item 219. 562 F.3d 256, 264 (3d Cir. 2009). For further background information surrounding the \textit{Webb} decision, see Marin, \textit{supra} note 179, at 8 (providing background and analysis of the case prior to the Third Circuit ruling).
\item 220. \textit{GEO Group}, 616 F.3d at 275.
\item 221. See \textit{id.}
\item 222. See \textit{id.} at 275-76.
\item 223. \textit{Id.} at 274.
\item 224. \textit{Id.}
\item 225. See \textit{id.}
\item 226. \textit{Id.} at 275.
\item 227. See \textit{id.}
\item 228. \textit{Id.} at 273.
\end{itemize}
\end{footnotesize}
exemplifying the manner in which the inherently weak undue hardship standard of Title VII can render prison security concerns as virtually insurmountable for prison employees when seeking accommodation for certain faith-based garb.

III. WHAT THE WRFA COULD AND SHOULD MEAN FOR RELIGIOUS ACCOMMODATION FOR PRISON WORKERS AS TO GROOMING AND GARB

In light of this overall analysis of the WRFA and the recent cases, Booth v. Maryland and E.E.O.C. v. GEO Group, Inc., how should courts balance the legitimate security concerns in the prison context and the substantial religious expression rights of prison employees if the WRFA is made into law? More specifically, how should courts frame the legal arguments and interests of the parties involved in these types of cases and appropriately incorporate the heightened standard of review that the WRFA would seem to demand? As the aforementioned examination has sought to demonstrate, the apparent tension between the WRFA and the reasoning offered by the courts in Booth and GEO Group rests in the potential interplay between the significant difficulty standard of the WRFA and the deference that courts have seemingly been apt to give to generalized claims of prison security concerns. It is submitted here that, were the WRFA enacted and the significant difficulty test formally incorporated into the proposed Act, the proper legal approach for courts would be to take a probing and discerning look at the security concerns offered by prison facilities. As such, it appears that courts would need to require at least some degree of specificity from prison employers as to the grounds for the safety concerns presented.229

The above position appears founded, in part, on the fact that at least one federal judge230 has alluded strongly that a more scrutinizing judicial approach should already be taken by courts under the current undue hardship standard of Title VII.231 Specifically, the dissenting judge in GEO Group maintained that prison employers should be tasked with assuming "the burden of proving the existence of the asserted safety

229. See id. at 277 (Tashima, J., dissenting).
230. The dissenting opinion in GEO Group provides compelling support for the difficulties created when courts elect to readily accept prison security claims. See id. at 277-92.
231. See id.
concerns, as well as of the fact and magnitude of the asserted hardship in accommodating plaintiffs' religious needs.

This heightened approach would seem appropriate for the standard of significant difficulty in that it would serve to reflect the WRFA's apparent intention to make employers offer more substantial foundations in justifying decisions to curtail workplace religious expression. Furthermore, such a probing judicial approach would help to ensure that security concerns are truly legitimate, neither "pretextual" nor "highly speculative," and not amounting to "post-hoc safety rationale." Such an interest seems warranted due to the fact that the reasoning of courts in cases such as Booth and GEO Group, "in effect, establishes a per se rule that when an employer asserts that its rationale for denying a religious accommodation is safety, the employer need not adduce any evidence to prove the existence of, let alone the magnitude of, the burden it would suffer by accommodating the religious practice." In essence, eliciting from prison employers detailed facts that underscore their security rationale would serve to create legal grounds upon which judicial balancing of religious expression rights are more faithfully weighed against legitimate safety considerations necessary in prison facilities.

With this suggested judicial approach to interpreting and applying the significant difficulty test, it is essential to also highlight the fact that courts and prison officials alike need to fundamentally reexamine whether or not security interests are truly as pressing in the prison context when an employee's religious garb or grooming is at

232. Id. at 277.
233. See Foltin, supra note 1, at 76 ("In assuring that employers have a meaningful obligation to reasonably accommodate their employees' religious practices, WRFA will restore to Title VII's religious-accommodation provision the weight that Congress originally intended.").
234. GEO Group, 616 F.3d at 278 (Tashima, J., dissenting).
235. Id. at 285.
236. Id. (referring specifically to the majority opinion in GEO Group).
237. This suggestion is not to assert that safety is not of paramount importance in the prison context. Instead, this perspective is intended to further argue that religious expression is too inherently essential as an individual right to be subordinated without some degree of probing inquiry.
issue as is sometimes implied in judicial opinions. As the dissent highlights in GE0 Group, for example, there appeared to have been nothing in the record to substantiate the claims by the wardens of the facility that there existed security concerns related to the wearing of khimars by the employees in question. Specifically, in regards to at least two of the Muslim women employees in the prison, neither one appeared to have consistently been “within the secure perimeter of the prison” during her course of employment, a fact that suggests that they were not frequently present in the areas of the facility where prisoner contact with employees would necessitate heightened security concerns. The dissent also notes that there was no evidence that any of the problems actually recorded in the prison related to the smuggling of contraband, weapons, or other items of concern were causally linked to the wearing of religiously-motivated head coverings, such as khimars.

Similarly, had the court reviewed the record “with the healthy skepticism” advocated by the dissent and supported in this overall discourse, it could have recognized that “[t]he potential risk for obscured identity created by allowing a handful of correctional officers to wear underscarves does not remotely compare with the same risk created by issuing to or permitting the wearing of hats by hundreds of inmates.”

One could claim that this perspective clearly underscores the proposition that some courts take the security issues raised by prison officials as a given, even to the point that they ignore occasions where safety concerns fail even to be rational. Construed in this manner, it seems especially essential for the WRFA’s significant difficulty test to be judicially construed as entailing searching review of the record when prison security concerns collide with the religious expression rights of prison employees.

238. See GE0 Group, 616 F.3d at 274 (“Even assuming khimars present only a small threat of the asserted dangers, they do present a threat which is something that GE0 is entitled to attempt to prevent.”).
239. See id. at 284 (Tashima, J., dissenting).
240. Id.
241. Id.
242. See id.
243. See id.
244. Id. at 287.
245. Id. at 287-88.
246. Id. at 288.
A consideration of the rationale advanced in Booth raises similar questions about the actual substance, validity, and overall legitimacy of safety concerns when an employee's faith-based grooming practices are under scrutiny. The Fourth Circuit appeared to support the reasoning of the district court in the case, which held that the security concerns of the prison facility in preventing Booth from wearing dreadlocks were sufficient and should be upheld. The latter is particularly troublesome and indicative of the need for courts to more fully probe the security justifications of prisons in these types of cases, given that the district court openly stated: "While the defendants' explanation that guards with dreadlocks might be confused with prisoners during an uprising or attempted breakout might be considered questionable and its elaboration in the present record of its policy rationales is sparse, the defendants have met their low burden." There was evidence in the record from the district court, subsequently acknowledged by the Fourth Circuit, that the prison facility in question had provided religious accommodation for the religiously-motivated grooming choices of other employees. An examination of the opinions of both the district court and the Fourth Circuit reveals that neither attempted to thoroughly consider how it was that Booth's dreadlocks would have caused any more uncertainty as to the identity of prisoners and guards "during an uprising or attempted breakout" than the faith-based grooming practices already permitted of other prison employees. It is fair to maintain that,

247. See Booth v. Maryland, 327 F.3d 377, 381 (4th Cir. 2003).
249. Id.
250. See id. at 398-99.
251. See Booth, 327 F.3d at 380-81.
252. See id.
253. See Booth, 207 F. Supp. 2d at 399.
254. See Booth, 327 F.3d at 380-81.
256. See Booth, 327 F.3d at 380-81 (explaining that "similarly situated females are allowed to wear their hair braided and substantially longer than the dreadlocks he wears"). As highlighted earlier in this Note, see supra note 150 and accompanying text, the Third Circuit did hold that "the Department applied a facially neutral policy in an unconstitutional manner." Booth v. Maryland, 337 F. App'x 303, 303 (4th Cir. 2009). However, this section of the opinion does not significantly raise security issues. See also Booth, 327 F.3d at 380-83 (noting that the policy was selective in when it was enforced).
were an employee to bring a similar claim under Title VII, the significant difficulty test of the WRFA suggests courts would have to press prison authorities on the latter types of glaring gaps in security rationales and adequately bear "the burden of proving the existence of the asserted safety concerns."257

It must be noted that this overall discussion of the need for both greater protections of the religious expression rights of employees in prison facilities and more searching judicial examination of the legitimacy of safety concerns does have a relevant legal basis.258 Specifically, "Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000"259 or "RLUIPA"260 provides additional evidence of "congressional efforts to accord religious exercise heightened protection from government-imposed burdens"261 in the prison context. In particular, RLUIPA, deemed constitutional262 by the United States Supreme Court in Cutter v. Wilkinson,263 maintains in a portion of Section 3264 that "[no] government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers 'a compelling governmental interest,' and does so by 'the least restrictive means.'265 As the Supreme

258. As acknowledged later in this discussion, one of the clear differences between RLUIPA and the WRFA pertains to the fact that RLUIPA protects the incarcerated, 42 U.S.C. §§ 2000cc-1(a)(1), (2) (2006), whose freedom of religious expression is restricted in ways that are not identical to the challenges of expression faced by prison employees. See Morgan F. Johnson, Heaven Help Us: The Religious Land Use and Institutionalized Persons Act's Prisoners Provisions in the Aftermath of the Supreme Court's Decision in Cutter v. Wilkinson, 14 AM. U.J. GENDER SOC. POL'Y & L. 585, 591-92 (2006) (citing 146 Cong. Rec. S7774-01, S7775 (daily ed. July 27, 2000)) ("Congress based the need for RLUIPA on three years of hearings, which concluded that inmates were at the mercy of prison officials, who often imposed arbitrary rules regarding the right to practice religion."). However, consideration of the legal basis for RLUIPA assists in highlighting some arguments in favor of greater judicial protections for prison employees under the WRFA.
260. Id.
261. Id. at 714.
262. Id. at 732-33.
264. See id. at 712.
265. Id. (quoting RLUIPA, 42 U.S.C. § 2000cc-1(a)(1)-(2)(2006)).
Court has noted,266 "RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government’s permission and accommodation for exercise of their religion."267 RLUIPA asserts the premise that those within the coercive prison context,268 specifically prisoners, warrant formal protections that ensure their First Amendment rights.269

In Cutter, the plaintiffs were former and current inmates who were "adherents of 'nonmainstream' religions: the Satanist, Wicca, and Asatru religions, and the Church of Jesus Christ Christian."270 These plaintiffs alleged, inter alia,271 that, while in prison, officials prevented them from adhering to and openly practicing various manifestations of their faiths, including making certain clothing choices and reading religiously oriented literature.272 In considering these claims, as well as the overall dictates of RLUIPA,273 the Supreme Court did note that RLUIPA does not act to "elevate accommodation of religious observances over an institution's need to maintain order and safety."274 However, implicit in the Court’s reasoning is the notion that statements of a prison’s desire for or concerns over “order and safety,”275 in and of themselves, are not justifications for suppressing an inmate’s religious expression rights.276 This idea is reflected in the fact, as one commentator has noted, “RLUIPA incorporates the Supreme Court’s standard for substantial burden, which asks whether government action (1) puts pressure on individuals to modify their religious behavior or (2) prevents them from engaging in religious conduct in a way that is greater than a mere inconvenience."277 It is valid to contend that the central

266. See id. at 721.
267. Id.
268. Id. at 714-17.
269. Id.
270. Id. at 712.
271. See id. at 713.
272. Id.
273. See id. at 719-26.
274. Id. at 722.
275. Id.
276. See id. at 724-26.
The premise of RLUIPA is that "the State does not have the right to seek to bind and control the religious beliefs and acts of conscience of those individuals"\textsuperscript{278} incarcerated in the nation's prisons.\textsuperscript{279} Additionally, it is fair to assert that the Court in \textit{Cutter} subtly recognized the validity of the latter general idea in its claim that if "inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition"\textsuperscript{280} under RLUIPA.\textsuperscript{281} By using the language of "excessive" and "unjustified burdens,"\textsuperscript{282} the Court appears to suggest that, even in the required balancing that the judiciary must undertake between security interests and prisoners' rights to religious practice,\textsuperscript{283} facilities must actually articulate a sufficient basis for their safety concerns to withstand RLUIPA-based claims.\textsuperscript{284}

The aforementioned analysis is crucial to the argument that courts should interpret the WRFA, should it become law, in a manner that places a heavier burden of justification on prisons when they infringe upon the religious expression rights of inmates. Specifically, such a position is rooted in how prisoners' grooming and garb claims

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{278} \textit{Id.} at 607.
\item \textsuperscript{279} \textit{See id.}
\item \textsuperscript{280} \textit{Cutter}, 544 U.S. at 726.
\item \textsuperscript{281} \textit{Id.}
\item \textsuperscript{282} \textit{Id.}
\item \textsuperscript{283} \textit{See id.} at 720-23.
\item \textsuperscript{284} \textit{See}, e.g., Koger v. Bryan, 523 F.3d 789, 800 (7th Cir. 2008) (requiring, in reference to dietary restrictions placed on a religiously observant inmate by a prison, that the prison establish that it pursued "the least restrictive means of furthering a compelling governmental interest" in seeking to maintain "good order"); Lovelace v. Lee, 472 F.3d 174, 191 (4th Cir. 2006) ("[W]e have no sworn statement from the warden, the assistant warden, or any other prison official that discusses any security, safety, or cost consideration that justifies the restrictions in the Ramadan policy. That is the fundamental problem presented in this appeal . . . ."); United States v. Hardman, 297 F.3d 1116, 1131 (10th Cir. 2002) (suggesting, in its interpretation of the now repealed Religious Freedom Restoration Act, that, in regards to the burden on officials in stating their claim, "[t]he government bears the burden of building a record that proves that the statutory and regulatory scheme in question is the least restrictive means of advancing the government's compelling interests").
\end{itemize}
\end{footnotesize}
have "played out" in some courts under RLUIPA.\textsuperscript{285} As one commentator has maintained:

Prisons generally assert that limiting beard and hair length removes a hiding place for contraband and helps to prevent inmates from changing their appearance (which could aid their ability to escape). Thus far, the majority of cases to resolve this issue under RLUIPA have held that prisons have failed to carry their burden of proof on this issue. Although they have accepted that the prisons' asserted reasons may sometimes satisfy strict scrutiny, the majority of courts have held that that a flat prohibition on religious exemptions from grooming policies without regard to either (1) the length of the requested beard or haircut or (2) whether exemptions are allowed for medical reasons may not satisfy strict scrutiny.\textsuperscript{286}

The above results under RLUIPA suggest that at least some courts since the Act's passage have elected to take a harder look at the record to determine whether the proffered security concerns of prisons truly outweigh religious liberty interests or should be tempered by genuine efforts of accommodation.\textsuperscript{287} This general trend is significant in this overall analysis because it provides a relevant framework for courts to reference when analyzing potential religious expression claims by prison workers under the WRFA. Specifically, it seems sensible that if courts are more willing to probe the proffered security concerns of prison officials to a relatively extensive degree under RLUIPA as a result of a

\textsuperscript{285} See Gaubatz, supra note 277, at 560.

\textsuperscript{286} Id.

\textsuperscript{287} See id.; see, e.g., Lovelace, 472 F.3d at 190 ("The defendants have not adequately demonstrated on this record that the Ramadan policy is the least restrictive means of furthering a compelling governmental interest . . . [T]hey do not present any evidence with respect to the policy's security or budget implications.") (citation omitted); Mayweathers v. Terhune, 328 F. Supp. 2d 1086, 1095 (E.D. Cal. 2004) ("Because I conclude above that the plaintiffs have made a sufficient showing that the regulations are an exaggerated response to defendants' security concerns, it follows that defendants have not demonstrated that the regulations are the least restrictive means of achieving a compelling governmental interest.").
prisoner’s freedom of expression claim, a parallel approach should be assumed in the WRFA jurisprudence for prison employees. While prison employees do not arguably “encounter undue impediments to their religious observances” to the same extent as prisoners, legitimate reasoning is not readily apparent for restricting forms of employee religious expression in the workplace that are similar to those that may be allowed from prisoners. In essence, if the religious freedom-based garb and grooming claims of prisoners must trigger a greater showing of safety concerns on the part of a prison, it would be nonsensical from a legal perspective not to treat the significant difficulty test of the WRFA as requiring the same.

CONCLUSION

What the effect will be on the religious expression rights of prison employees, if the WRFA is made into law, remains to be seen. However, as Booth v. Maryland and E.E.O.C. v. GEO Group, Inc. clearly demonstrate, the present judicial approach to “protecting” the garb and grooming rights of prison employees is untenable. In a nation that often seems to take great pride in its historical reverence for First Amendment rights, it is not an overstatement to claim that the legal standards applied in the latter cases fail to embody the constitutional protections valued by Americans. While the safety and security interests of prisons are certainly legitimate and worthy of great respect, the religious expression interests of prison employees are too inherently meaningful for courts to sacrifice without demanding more. Perhaps the case-by-case analysis and discerning examination of the proffered interests of prisons proposed in this Note is not the only approach that would effectively advance the religious expression rights of prison employees. Yet, at the very least, maybe the latter approach could provide a time in the future where the judiciary will more actively “search for security.”

289. See E.E.O.C. v. GEO Group, Inc., 616 F.3d 265, 288 (Tashima, J., dissenting) (“The potential risk for obscured identity created by allowing a handful of correctional officers to wear underscarves does not remotely compare with the same risk created by issuing to or permitting the wearing of hats by hundreds of inmates.”).